Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1994

OCIE MILLS and CAREY C. MILLS,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the United States Army Corps of Engineers' regulatory definition of "wetlands" under the Clean Water Act unconstitutionally vague in a *criminal* case?

2. Is something more than an "intelligible principle" required when Congress authorizes another branch to promulgate regulations that contemplate criminal sanctions?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to this action.

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DECISIONS BELOW

The decision of the United States Court of Appeals, Eleventh Circuit is reported at 36 F.3d 1052 (11th Cir. 1994), and is reproduced as Appendix A. The decision of the United States District Court is reported at 817 F. Supp. 1546 (N.D. Fla. 1993), and is reproduced as Appendix B. Page references are to versions in the appendix.

JURISDICTION

The decision of the United States Court of Appeals, Eleventh Circuit, review of which is sought in this petition, was entered on October 27, 1994, and was filed that same day. A timely petition for rehearing was denied on January 13, 1995. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

At issue in this case are Article I, Section 1, and the Fifth Amendment to the United States Constitution. Also at issue are Sections 301(a) and 309(c) of the Clean Water Act, Title 33 U.S.C. §§ 1311(a) and 1319(c). The full text of the relevant provisions of the Act and the above-mentioned constitutional provisions are set out in Appendix C.

STATEMENT OF THE CASE

As described by the District Court:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable *waters* of the United States."

U.S. v. Mills, 817 F. Supp. at 1548, Appendix at B-1 (emphasis in original).

Indeed, the facts of this case are astonishing. Ocie and Carey Mills collectively spent almost *four years* in prison because the Army Corps of Engineers (Corps) has determined that the act of placing unadulterated fill on arid land constitutes a discharge of pollutants into waters of the United States in violation of Sections 301(a) and 309(c) of the Clean Water Act. 33 U.S.C. §§ 1311(a), 1319(c). RE:1.[1] Ocie and Carey Mills were found guilty in a 1989 jury trial of five counts of placing sand, which the Clean Water Act defines as a "pollutant," into a "wetland" which the Corps' regulatory definition describes as

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3(b) (1986). Ocie and Carey Mills were also convicted of a misdemeanor offense of unlawfully excavating a drainage ditch between two lots in the "navigable waters of the United States," in violation of

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[1] The record below is referred to by its docket number volume and the proceedings before the District Court. All proceedings docketed prior to the filing of Ocie and Carey Millses' 28 U.S.C. § 2255 motion are referred to as RE and those after as R1. Thus, RE:84 at 73 refers to docket entry 84 at Page 73. R1:170 at 1 would refer to docket entry 170 (filed after the 28 U.S.C. § 2255 motion was filed) at Page 1.

Sections 10 and 12 of the Rivers and Harbors Act, 33 U.S.C. §§ 403 and 406.

The facts which preceded their convictions are as follows. In 1986, Ocie and Carey Mills purchased two waterfront lots, Lots 20 and 21, on Escambia Bay, Florida, for purposes of constructing residences. RE:84 at 80, 103, 142 and RE:31. Lot 21 was deemed by the Corps to be upland while a significant portion of Lot 20 was deemed by the Corps to be "wetland." In contrast, the Florida Department of Environmental Resources determined most of the same portions of Lot 20 were not "wetland." As described by the District Court:

> Although Lot 20 (like Lot 21) is a waterfront lot, it does not have the appearance of what most lay people think of as a "wetland." Prior to the events in question here, it was originally mostly wooded, with large pine, oak, gum, bay and magnolia trees, as well as lots of smaller trees and shrubs. Some of the these trees grow well in saturated soil conditions, while others do not.

U.S. v. Mills, 817 F. Supp. at 1548, Appendix at B-3.

The alleged filling violation took place in the disputed area of Lot 20 which included an historic drainage area.

In its natural state, Lot 20 had a dish-shaped drainage area through the center that apparently carried rainwater runoff from inland to the bay, but which actually stopped several feet from the bay. RE:84 at 103-04. As such, this drainage area contained no standing water, nor did it appear to be a swamp, marsh, or bog. As part of the subdivision development in 1978, the drainage area on Lot 20 was offset about 45 feet by the construction of a ditch between Lots 19

and 20. Ultimately, the drainage area through Lot 20 was blocked and partially filled by the subdivision developer. *Id.* The diversion of the drain and some filling of Lot 20 was apparently done prior to the effective date of the applicable Clean Water Act regulations, and long before Ocie and Carey Mills bought their lots in 1986. *U.S. v. Mills*, 817 F. Supp. at 1548, Appendix at B-4.

In this context the saga begins. In response to observations in June, 1986, that some excavation had occurred on Lot 20, the Corps sent a Cease and Desist letter to Ocie and Carey Mills. RE:84 at 149, 152-54. Petitioners responded with a letter to Colonel Charles Meyers, III, of the Corps, dated June 24, 1986, outlining their belief that most of Lot 20 was not a "wetland." *Id.* Nevertheless, petitioners suspended work on Lot 20 for over a year. RE:84 at 156-57. The Corps never responded to petitioner's letter. Ocie and Carey Mills assumed, therefore, that the Corps agreed with their assessment of the property and proceeded with their work on Lot 20. RE:84 at 159. In August of 1987, the Corps sent another Cease and Desist letter to petitioners. RE:84 at 155; RE:85 at 220, 232. In that letter, as with the prior letter, petitioners were advised to call a telephone number if they had any questions. That number was the telephone number for the Florida Department of Environmental Resources. *Id.*

Petitioners contacted the Florida Department of Environmental Resources, then wrote a letter to the Corps in September of 1987 stating the department agreed with petitioners that Lot 20 was mostly upland and that the department approved of the work on the drainage ditch. RE:84 at 165-68. In March of 1988, Ocie and Carey Mills continued the work on Lot 20 until Corps representatives entered the property with a search warrant and took various soil samples from the site. RE:85 at 342-44, 351. In

October of 1988, petitioners were charged with a six-count criminal indictment. RE:1.

Thinking that the charges were ludicrous, and not being eligible for appointed counsel which they had requested, father and son represented themselves at trial. RE:32-35. Much to their surprise, they were found guilty and each sentenced to 21 months in prison, followed by 1 year of supervised release. *Id.* In addition, the court imposed a $5,000 fine and a monetary assessment of $250 each. Ocie and Carey Mills were also required to comply with a Site Restoration Plan. RE:51, 53. Following this conviction, Ocie and Carey Mills filed a direct appeal. RE:55. The convictions were summarily affirmed by the Eleventh Circuit Court of Appeals. *United States v. Mills*, 904 F.2d 713 (11th Cir. 1990).

Ocie and Carey Mills served 19 of their 21-month sentence at a federal prison camp and the last two months in a halfway house. In a subsequent proceeding regarding the Millses' supervised release and their obligations under the Site Restoration Plan, District Court Judge Roger Vinson held an extended evidentiary hearing. By order dated December 24, 1991, Judge Vinson determined Ocie and Carey Mills had substantially complied with the Plan. He also determined that at the time of the alleged criminal act, "the subject land (Lot 20) was probably not a 'wetland' because the subdivision developer had diverted the drain on Lot 20 in 1978, prior to the effective date of the applicable Clean Water Act regulations and long before the petitioners bought their lots in 1986." *See U.S. v. Mills,* 817 F. Supp. at 1548, Appendix at B-1 to B-4 (discussing prior proceedings).

In addition to this bizarre turn of events, after their conviction Ocie and Carey Mills discovered through a

Freedom of Information Act request a letter dated February 12, 1987, from Colonel Meyers to the United States Attorney. In that letter, Colonel Meyers recommended prosecution of petitioners in large part because of Ocie Mills' "highly publicized prior involvement with the Corps ... beginning in 1976, [and] his documented furnishing of advice to others." R1:156, Attachment 1 at 2.

Based on Judge Vinson's determination that Lot 20 was probably not a "wetland" and the revelation that prosecution had been recommended, in part, because Ocie Mills was an upstart, petitioners moved to vacate, set aside, or correct their sentences, pursuant to 28 U.S.C. § 2255, or for a writ of error coram nobis. R1:170. They raised four grounds in support of their motion: (1) that their convictions under the Clean Water Act are void because the Corps' definition of "wetlands" is an improper delegation of congressional authority or unconstitutionally vague in a criminal case; (2) that they were selectively prosecuted for exercising their First Amendment rights; (3) that they were denied due process when the trial court prevented them from presenting to the jury the defense of equitable estoppel; and (4) there was insufficient evidence that at the time they placed fill material on their property, the property was a "wetland." R1:170.

The District Court rejected the second, third, and fourth grounds due to procedural errors, namely, the Millses' failure to raise these issues during the original trial. With great reluctance, the court also rejected the first ground issues of delegation and vagueness. Although this case involves a criminal conviction, Judge Vinson felt constrained by this Court's decision in the civil case of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The Eleventh Circuit Court of Appeals affirmed. *Mills v. United States*, 36 F.3d 1052 (11th Cir. 1994) (reproduced in

Appendix A). A timely petition for rehearing to the Court of Appeals was denied on January 13, 1995. Ocie and Carey Mills now seek justice from this final Court of review to expunge their criminal records and prevent similar unjust situations from occurring in the future.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(a) lists among the considerations governing review on writ of certiorari the circumstance when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. This ground for review is presented in this case.

I

WHETHER THE CORPS' DEFINITION OF THE TERM "WETLANDS" IS UNCONSTITUTIONALLY VAGUE IN A CRIMINAL ENFORCEMENT CONTEXT IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1251, *et seq.*, commonly known as the "Clean Water Act," was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this purpose, the Clean Water Act makes it unlawful to discharge any pollutant into "navigable waters" without a permit from the Corps. 33 U.S.C. §§ 1311, 1344, 1362. The Act expansively defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). "Pollutants" are also broadly defined to include "dredged spoil, solid waste, incinerator residue, sewage, garbage,

sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, *sand*, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. § 1362(6) (emphasis added).

Obviously, the scope of the phrase "waters of the United States" becomes crucial for purposes of enforcement of the Act because it determines where one can and cannot discharge a pollutant without a permit. It is also important because violations of the Act carry severe criminal penalties. Negligent discharges of pollutants without a permit into navigable waters are punishable by a fine of between $2,500 and $25,000 per day of violation and imprisonment of not more than one year. 33 U.S.C. § 1319(c)(1). Knowing discharges of pollutants into the same waters can result in a fine of between $5,000 and $50,000 per day of violation and imprisonment for not more than three years. 33 U.S.C. § 1319(c)(2).

Despite the importance of the breadth of the phrase to the Act's enforcement, Congress did not define the term "waters of the United States" in the Clean Water Act. Absent congressional definition, the Corps and the Environmental Protection Agency (EPA), the entities charged with administering and enforcing the Act, were left to the task of defining the term.

The Corps and EPA enacted identical regulations defining "waters of the United States" as including what are thought of as traditional types of "waters," such as rivers, lakes, streams, and seas. 33 C.F.R. § 328.3(a) (Corps' definition); 40 C.F.R. § 230.3(t) (1980) (EPA definition). However, the regulations also extend the Clean Water Act's protection to "wetlands" which are adjacent to waters. The

regulations then make a quantum leap onto land when they define "wetlands" as

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. Section 328.3(b) (Corps' definition); 40 C.F.R. § 230.3(t) (EPA definition).

The fundamental protection of due process contained in the Fifth and Fourteenth Amendments to the United States Constitution dictate that a legislative enactment is void for vagueness if its prohibitions are not clearly defined. The underlying purpose for this protection is the preservation of the constitutionally safeguarded fundamental rights of life, liberty, and property. As explained by this Court:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and

> subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). Since "due process is violated when men of ordinary intelligence must guess at a statute's meaning," fundamental fairness dictates that a statute set out the conduct which it forbids in terms which people of ordinary intelligence can readily understand. *Id.*

The fact that this Court affirmed the Corps' definition of "wetlands" in *the civil case* entitled *United States v. Riverside Bayview Homes, Inc*, 474 U.S. at 132, is of no consequence to these proceedings which are in the *criminal enforcement* context. As a general principle, the criminal laws are to be strictly construed. This rule of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). In fact, this Court reaffirmed lenity as the interpretative rule of law in construing criminal statutes in the case of *Liparota v. United States*, 471 U.S. 419 (1985), *which was decided the same year as Riverside Bayview.* That case dealt with knowing violations of a federal statute relating to food stamp fraud. This Court stated:

> In addition, requiring mens rea is in keeping with our longstanding recognition of the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." ... Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. ... Although the rule of lenity is not to

> be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretative guideline when the congressional purpose is unclear.

In the instant case, this rule of lenity directly supports petitioners' contention that the Corps' definition of "wetlands" is unconstitutionally vague in a criminal case. For this reason, the District Court felt some discomfort in relying on the civil case of *Riverside Bayview*. When it applied the rule of lenity to the Corps' "wetlands" definition, the District Court could not escape the following conclusion:

> Statutory language must convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Mena*, 863 F. 2d 1522,1527 (11th Cir.), *cert. denied*, 493 U.S. 834, 110 S. Ct. 109, 107 L.Ed.2d 72 (1989). This is so that persons of common intelligence will not be forced to guess at the potential applicability of a criminal prohibition to their conduct. *Id*. The statutes enacted by Congress define as criminal the discharge of pollutants into the "waters of the United States." I am unable to say that a person of common intelligence would be able to ascertain that this statutory prohibition applies to clean fill dirt placed onto a waterfront lot such as the one at issue here.

U.S. v. Mills, 817 F. Supp. at 1554, Appendix at B-20.

In fact, at the time petitioners committed the alleged offenses there was no uniform definition of "wetlands" among the federal agencies that enforce the Clean Water Act. A brief review of the tortured history of the definition of a

"wetland" reveals just how unintelligible the term "wetland" is. Four federal agencies are responsible for identifying wetlands in their regulatory programs: the Corps, EPA, the Soil Conservation Service (SCS), and the United States Fish and Wildlife Service (USFWS). Throughout the 1980s and early 1990s, disagreements among these agencies over how to delineate wetlands in the field led to the development of four quite different delineation manuals: (1) The Corps' 1987 Wetlands Delineation Manual (1987 Manual); (2) EPA's 1988 Wetlands Identification and Delineation Manual (Interim Manual); (3) the interagency (Corps, EPA, USFWS, and SCS) 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual); and (4) joint Corps/EPA 1991 proposed revisions to the 1989 Manual (1991 Manual). Virginia S. Albrecht, *Federal Regulation of Wetlands*, C930 ALI-ABA 111, 141 (1994).

The 1989 Manual was criticized as expanding federal jurisdiction over areas that had not previously been considered jurisdictional wetlands. Carol E. Dinkins, *Regulatory Obstacles to Development and Redevelopment in the U.S.: Wetlands and Other Essential Issues*, C945 ALI-ABA 491, 502 (1994). The methodology for determining wetlands hydrology was also criticized because, under the 1989 Manual, wetlands hydrology can be established if for seven consecutive days during the growing season saturated soil exists as deep as 18 inches *below the surface*--meaning the top one and one-half feet can be dry all year long in the "wetland." *Id.* The Corps' 1987 Manual resembles the 1989 Manual, but would require that inundation or saturation of the surface be demonstrated for 5% to 12.5% of the growing season. In many cases, this will exceed the seven days of saturation required under the 1989 Manual. *Id.* at 504. As proposed, the 1991 Manual would require inundation for 15 or more consecutive days or saturation to the surface for 21 or more consecutive days during the growing season. *Id.*

at 503. Alternatively, an area may have wetland hydrology under the 1991 Manual if it is periodically flooded by tidal waters in most years. *Id.*

Due to the criticism of the 1989 Manual, in August, 1991, Congress passed legislation that prohibited the Corps from using the 1989 Manual or any subsequent manual adopted without the notice-and-comment rulemaking procedures required by the Administrative Procedures Act. Virginia S. Albrecht, *Federal Regulation of Wetlands*, C930 ALI-ABA at 141. Consequently, in 1991, the Corps began using the 1987 Manual, as interpreted by guidance documents issued by the Corps headquarters in October, 1991, and March, 1992. In 1993, EPA announced that it will use the 1987 Manual to identify wetlands. *Id.* (citing 58 Fed. Reg. 4995 (1993)). Interestingly, in its legislation prohibiting the use of the 1989 Manual, Congress did not specify which agency, the Corps or EPA, has authority to make jurisdictional determinations, nor did Congress define how agencies should proceed when they disagree whether a particular site is subject to regulation. *Id.* at 142. In 1992, Congress directed the National Academy of Sciences to conduct a study on wetlands presumably to clear the mess up once and for all. Pub. L. No. 102-389 (1992).

Obviously, this sequence of regulatory events admits to the uncertainty of the Corps' "wetlands" definition. If the "wetland/upland" boundary is not clear-cut, it is ambiguous. If the Corps cannot describe "wetlands" with certainty, how are persons of ordinary intelligence to know when they have run afoul of the law? It is a gross miscarriage of justice that two men were deprived of their liberty when Executive Branch agencies cannot agree generally on what constitutes a "wetland" and specifically on whether petitioners' property really was a "wetland." (Nor, as evidenced by the con-

flicting District Court opinions in the Millses' litigation, can the judiciary branch agree.)

The rule of lenity dictates the Corps' definition of "wetlands" be voided for vagueness in criminal matters. The Eleventh Circuit refused to void it. This Court should now seize upon this opportunity to do it.

II

WHETHER SOMETHING MORE THAN AN "INTELLIGIBLE PRINCIPLE" IS REQUIRED WHEN CONGRESS AUTHORIZES ANOTHER BRANCH TO PROMULGATE REGULATIONS THAT CONTEMPLATE CRIMINAL SANCTIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

Our nation was founded on the tripartite system of government. The three branches of government--legislative, executive, and judicial--are specifically designed to operate under a system of checks and balances to guard against the undue concentration of government power in one branch of government. As described by this Court:

> The Constitution sought to divide the delegated powers ... to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 951 (1983).

The principle focus of the separation of powers doctrine is the avoidance of tyranny. As stated by Madison in the Federalist Papers No. 47:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. Under the separation of powers principle, Congress alone can exercise the essentials of the legislative function, which are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct. *Yakus v. United States*, 321 U.S. 414, 426-27 (1944). Under the nondelegation doctrine which emanates from this specific constitutional grant of authority, Congress may not constitutionally delegate its legislative power to another branch of government. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.").

Nonetheless, Congress may seek assistance, within proper limits, from its coordinate branches. However, before the delegation is made, Congress must first "lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform."

J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).[2]

In its most recent case on point, *Touby v. United States*, 500 U.S. ___, 114 L. Ed. 2d 219, 227 (1991), this Court considered whether Congress' delegation of authority to the Attorney General to schedule controlled substances on a temporary basis constituted an unlawful delegation of Congressional authority to actors in the Executive Branch who already wielded the power of prosecution. Petitioners argued that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions [because] ... [such] regulations ... pose a heightened risk to individual liberty." *Touby*, 114 L. Ed. 2d at 227. This Court did not have occasion to reach this issue, however, because it found the labeling statute met constitutional "muster even if greater congressional specificity is required

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[2] *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (striking down provision of the National Industrial Recovery Act of 1933, which authorizes the President to issue executive orders for hot oil and established criminal penalties for violations thereof on the ground that Congress has "declared no policy, ha[d] established no standard, ha[d] laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited"); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (striking down section of National Industrial Recovery Act which authorized the President to establish codes for trades or industries because Congress had set forth no principles to guide the President in developing such codes).

in the criminal context." *Id.*[3] *See also United States v. Womack*, 654 F.2d 1034, 1038 (11th Cir. 1981) (holding Organized Crime Control Act provided Secretary of Treasury with adequate standards or safeguards to control the listing of explosives). The Court is now asked to reach the issue of whether something more than an "intelligible principle" is necessary in the instant case (assuming that such an intelligible principle has been laid down in the Clean Water Act).[4]

Assuming *arguendo* that Congress *did* provide the Corps with an intelligible principle, more specificity should be required when Congress delegates authority to an entity such as the Army Corps of Engineers to pass regulations that contemplate felony criminal sanctions, because there is a vast difference between the power to administratively regulate and the power to set felony crimes. As explained by Judge Vinson below:

> A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency such as the Army

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[3] Specifically, the Court found that the definite and mandatory provisions which accompanied Congress' grant of labeling authority "meaningfully constrained" the Attorney General's potential for abuse of delegated authority. *Touby*, 114 L. Ed. 2d at 227.

[4] When it enacted the Clean Water Act, Congress arguably failed to set forth an "intelligible principle" upon which the Corps could base its regulatory definition of "waters of the United States" for enforcement purposes. Congress' failure to provide articulate standards which are sufficiently definite in light of the complexity of the area at which the Act is directed, has resulted in the most vague of regulations.

> Corps--so long as Congress provides an "intelligible principle" to guide that agency--is enough to make any judge pause and question what has happened. Deferent and minimal judicial review of Congress' transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law. Since this court must apply the law as it exists, and cannot change it, there is nothing further that can be done at this level.

U.S. v. Mills, 817 F. Supp. at 1555, Appendix at B-21.

The issue of whether more specificity is required when Congress delegates authority to an entity such as the Army Corps of Engineers to pass regulations that contemplate felony criminal sanctions was expressly left unresolved by this Court in its most recent delegation case, *Touby v. United States*, 114 L. Ed. 2d at 227. This Court should take this opportunity to resolve that issue once and for all.

III

THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE FAILS TO CONFORM WITH THIS COURT'S PRIOR DECISION IN RIVERSIDE BAYVIEW

The Eleventh Circuit's decision in this case is simply not in harmony with either the written word or this Court's thinking in *Riverside Bayview*. The lower court has unnecessarily and unjustifiably extrapolated the holding in *Riverside*

Bayview to fit an entirely different case. It is the proverbial round peg in the square hole. At best, the Eleventh Circuit ignored petitioners' arguments respecting the unique character of this case as a criminal matter. At worst, the lower court mischaracterized petitioners' arguments so as to bring this case under the purview of *Riverside Bayview*. In either event, *Riverside Bayview* was misapplied.

In a long line of other cases, this Court has held broad delegations which result in vague regulations are more suspect in cases involving criminal sanctions. See *United States v. Robel*, 389 U.S. 258, 275 (1967) ("the numerous deficiencies connected with vague legislative directives ... are far more serious when liberty and the exercise of fundamental rights are at stake"); *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) ("discretion to make regulations ... might not be allowable to authorize creation of new crimes in unchartered fields"). The lower court decision in the present case is in direct conflict with these precedents.

The Eleventh Circuit should not be allowed to turn this Court's decisions upside down so it can evade review. As noted above, this Court has established a heightened standard of review, with respect to delegation and vagueness, in criminal cases. This Court has not created an exception to this rule under the Clean Water Act. However, the Eleventh Circuit has done so while claiming to rely on Supreme Court precedent. The lower court's decision in this case is incorrect and does not follow from the decision of this Court in *Riverside Bayview* and is inconsistent with that line of Supreme Court cases which requires heightened scrutiny of criminal statutes. The lower court decision should be overturned.

CONCLUSION

The importance of the federal question raised by this petition is clear and unmistakable. Congress has abdicated its power to define the elements of a criminal action in favor of the Army Corps of Engineers, an unelected administrative agency. The Corps' resulting definition of "wetlands" for purposes of enforcing the criminal provisions of the Clean Water Act cannot be understood by persons of ordinary intelligence. The vague definition lacks explicit standards and is, therefore, subject to arbitrary and discriminatory enforcement. Moreover, the lower court decision, that upholds the constitutionality of the Corps' amorphous definition of "wetlands," misapplies the civil case of *Riverside Bayview* and stands in open conflict with this Court's rulings that require heightened scrutiny of criminal provisions.

Review by this Court is necessary to settle the important question of law left unanswered in *Touby v. United States*. Review is also necessary to resolve the conflict created by the Eleventh Circuit decision in this case relative

to criminal matters. Petitioners respectfully urge this Court to grant this petition for writ of certiorari and reverse the judgment of the Eleventh Circuit Court of Appeals.

DATED: April, 1995.

Respectfully submitted,

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APPENDIX A

Ocie MILLS; Carey Mills,
Petitioners-Appellants,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 93-2757

United States Court of Appeals,
Eleventh Circuit

Oct. 27, 1994

Appeal from the United States District Court for the Northern District of Florida.

Before KRAVITCH, Circuit Judge, FAY and HENDERSON, Senior Circuit Judges.

PER CURIAM:

This is an appeal from an order entered in the United States District Court for the Northern District of Florida denying the appellants' motion to vacate or set aside their sentences brought pursuant to 28 U.S.C. § 2255, or in the alternative, for a writ of error coram nobis. *See United States v. Mills*, 817 F.Supp. 1546 (N.D. Fla. 1993). For the reasons stated below, we affirm.

I. BACKGROUND

The appellants, Ocie and Carey C. Mills, jointly owned two parcels of property located in the Spanish Landing Subdivision in Santa Rosa County, Florida, adjacent to the East Bay, an arm of the Gulf of Mexico. Earlier, in 1985, the United States Army Corps of Engineers (the "Corps") determined that a major portion of one of the lots was a wetland. At that time the land was owned by Lewis W. Jenkins. Jenkins, who planned to build a retirement home on the property, had placed some red clay fill on the site in preparation to build a driveway. Upon discovery of this activity, the Corps issued a cease and desist order to Jenkins, which informed him that it would be necessary to obtain authorization from the Corps prior to placing fill material on real estate designated as wetlands.[1] The order instructed him to either restore the area to its former state or to obtain an after-the-fact permit from the Corps. The unrestored property was later acquired by the appellants, with full knowledge of the problems surrounding its partial designation as wetlands. They continued to deposit dirt and sand fill on the wetlands area without a permit despite receiving two additional cease and desist letters.

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[1] The Clean Water Act prohibits the discharge of dredged or fill materials into "navigable waters," defined in the Act as "waters of the United States," without permission from the Corps. By regulation, the Corps has construed "waters of the United States," to encompass a broad category of "wetlands." *See* 33 U.S.C. §§ 1311, 1344, 1362; 33 C.F.R. §§ 323.2(a), 328.3; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24, 106 S.Ct. 455, 457-58, 88 L.Ed.2d 419, 424 (1985).

They also impermissibly enlarged an existing drainage ditch causing it to become subject to the ebb and flow of the tide.

The appellants were eventually charged with and found criminally liable of violating the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c) (Counts I, II, III, IV and VI), and the Rivers and Harbors Act, 33 U.S.C. §§ 403, 406 (County V). They were each sentenced to concurrent terms of imprisonment totaling twenty-one months and to one year of supervised release. In addition, they were both ordered to pay fines of $5,000.00 and $250.00 in special assessments. As a condition of supervised release, they were required to comply with a site restoration plan prepared by the Corps and the Environmental Protection Agency. This court, in an unpublished decision, summarily affirmed their convictions and sentences on direct appeal. *United States v. Mills*, 904 F.2d 713 (11th Cir. 1990).[2]

After the appellants were discharged from incarceration to supervised release, the government, through the United States Probation Office, petitioned the district court to enforce the conditions of supervised release because

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[2] The pleadings filed in the direct criminal appeal were not made a part of the record in the present appeal. According to the district court's order denying § 2255 relief, the appellants maintained on direct appeal that (1) § 1311 is unconstitutionally vague and overly broad; (2) the district court erroneously prevented them from asserting an equitable estoppel defense; and (3) there was insufficient evidence to establish that, at the time they placed fill material on the property in issue, it was a wetland. *See Mills*, 817 F.Supp. at 1549 & n. 2, 1555-56, 1558. The appellants do not take issue with the district court's account of their assignments of error on direct appeal. We, therefore, accept it as accurate.

of the alleged failure of the appellants to comply with the restoration plan. After holding extensive hearings and personally inspecting the site, Judge Roger Vinson, who did not preside over the criminal trial, rejected the government's contention that an additional ten inches of soil needed to be removed from the wetlands portion of the property (Lot 20) to achieve restoration. Specifically, Judge Vinson found that

> the elevation of Lot 20 is now at, or in some instances, below, the elevation as it existed in December of 1985. The Government's contention that ten more inches of soil need to be removed from Lot 20 would result in turning Lot 20 into a pond, an undesirable condition. The lot is now totally denuded and ugly, in stark contrast to the beautiful lot that existed prior to 1986. Although there are detectable amounts of clay remaining on the lot, I find that the defendants have met the requirements of the site restoration plan insofar as it applies to elevation.

(R1-154-7).

At some point during the pendency of the enforcement proceedings, the Millses filed the § 2255 petition, the subject of this appeal, which was also assigned to Judge Vinson for consideration and disposition. In it, the appellants asserted four grounds for relief--first, that their convictions under the Clean Water Act are void because Congress unconstitutionally delegated its legislative authority to the Corps to define "waters of the United States" to include an expansive view of what constitutes "wetlands"; second, that they were selectively prosecuted for exercising their First Amendment rights; third, that they were denied due process when the

district court prevented them from pursing a defense of equitable estoppel at their criminal trial; and fourth, that evidence presented in the supervised release hearing established that the property had ceased to be a wetlands at the time they added the soil fill.

Judge Vinson found that the second claim was procedurally barred because the Millses failed to raise it on direct appeal. He concluded, conversely, that the third and fourth grounds had already been rejected by this court and, therefore, were not subject to further review.[3] He observed

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[3] In support of the appellants' claim that the property no longer constituted a wetlands at the time of their ownership they relied on testimony presented at the supervised release hearing and on Judge Vinson's finding that the elevation of Lot 20 was at, or in some places below, its elevation in 1985. They argued that,

> if the lot is presently an upland, and the Defendants in some instances have gone below the elevation as it existed in December of 1985, then the property was obviously an upland in 1985. If the property was obviously an upland in 1985, the Corps did not have jurisdiction. The Mills' [sic] have been convicted and punished for conduct which was not criminal.

(R1-159-8). In the order denying § 2255 relief, Judge Vinson stated that a significant factual development from the supervised release hearing "was a determination that, at the time in question, the subject land (Lot 20) was probably not a 'wetland' for purposes of the Clean Water Act." *Mills*,

(continued...)

that the appellants also should have, but failed, to present earlier their constitutional argument concerning the delegation of authority to define "waters of the United States" to include "wetlands." Because this claim of error challenged the validity of the statute under which they were convicted, however, he reviewed its merits to determine whether this lapse could be excused under the fundamental miscarriage of justice exception to the procedural default doctrine. *See Mills*, 817 F.Supp. at 1549-50. After thoroughly analyzing the Clean Water Act, its legislative history and the context in which the statute was enacted, and in light of the Supreme Court's decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), Judge Vinson found no unconstitutional delegation of legislative power. *See id.* at 1552-55. He therefore denied relief and this appeal followed.

II. DISCUSSION

Generally speaking, an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be considered procedurally barred in a § 2255 proceeding. *See Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir.1989) (and the cases cited therein), *cert. denied*, 494 U.S. 1018, 110 S.Ct. 1322, 108 L.Ed.2d 498 (1990). A ground of error is usually "available" on

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[3] (...continued)
817 F.Supp. at 1548. He nevertheless concluded that the sufficiency of the evidence with respect to whether the property was a wetlands was "fully disposed of on direct appeal and, therefore, [was] not cognizable under Section 2255." *Id.* at 1549.

direct appeal when its merits can be reviewed without further factual development. *Compare United States v. Arango*, 853 F.2d 818, 823 (11th Cir.1988) (an allegation of ineffective assistance of counsel must be raised by collateral attack as opposed to direct appeal because of the necessity to develop a factual basis for its validity through a hearing), *with United States v. Andrews*, 953 F.2d 1312, 1327 (11th Cir.) (claims of ineffective assistance may be considered on direct appeal where there is sufficient evidence on the record to resolve the issue), *cert. denied*, ___ U.S. ___, ___, 112 S.Ct. 3008, 3048, 120 L.Ed.2d 882, 915 (1992). When a defendant fails to pursue an available claim on direct appeal, it will not be considered a motion for § 2255 relief unless he can establish cause for the default and actual prejudice resulting from the alleged error. *Cross v. United States*, 893 F.2d 1287, 1289 (11th Cir.), *cert. denied*, 498 U.S. 849 111 S.Ct. 138, 112 L.Ed.2d 105 (1990). Alternatively, under the fundamental miscarriage of justice exception, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397, 413 (1986). On the other hand, prior disposition of a ground of error on direct appeal, in most cases, precludes further review in a subsequent collateral proceeding. *See United States v. Hobson*, 825 F.2d 364, 366 (11th Cir.1987), *vacated on other grounds*, 492 U.S. 913, 109 S.Ct. 3233, 106 L.Ed.2d 581 (1989).

The appellants' first ground for relief, that Congress unconstitutionally delegated its duty to define "waters of the United States" to the Corps, should have been asserted on direct appeal. The district court correctly concluded

nevertheless that, if this delegation of authority rendered the statute void, the appellants' procedural default could be excused under the fundamental miscarriage of justice exception because a defendant is actually innocent of a crime where the underlying statute is without force or effect.[4] *See Gonzales v. Abbott*, 967 F.2d 1499, 1504 (11th Cir.1992). We also agree with the district court, however, that this constitutional argument lacks merit. In *Riverside Bayview Homes, Inc.*, the Supreme Court held that the Corps' interpretation of "waters of the United States" to include wetlands adjacent to navigable waters is reasonable and in keeping with the expressed intent of Congress.[5] *See Riverside Bayview Homes, Inc.*, 474 U.S. at 131-39, 106 S.Ct. at 461-65, 88 L.Ed.2d at 429-34. Further, we concur with the district court that, considering the purpose of the Clean Water Act, the context in which it was enacted and its legislative history, Congress provided sufficiently precise standards by which to judge the delegation in issue such that the appellants' challenge must fail. *See id.*; *United States v. Sans*, 731 F.2d 1521, 1527-28 (11th Cir.1984) (legislation which prescribes essential parameters and basic legislative policy and delegates to an administer authority for promulgation of rules and regulations is constitutionally permissible so long as the criteria are sufficiently clear to

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[4] The appellants did not attempt to show cause for their procedural default.

[5] The question of whether the Corps' authority properly extends to regulating the discharge of fill material onto wetlands not adjacent to bodies of open water was not before the Supreme Court, nor is it before us. *See Riverside Bayview Homes, Inc.*, 474 U.S. at 131 n. 8., 106 S.Ct. at 461 n. 8, 88 L.Ed.2d at 429 n. 8; *Mills*, 817 F.Supp. at 1551 n.5.

enable Congress, the courts and the public to ascertain whether the administrator has conformed to those standards), *cert. denied*, 469 U.S. 1111, 105 S.Ct. 791, 83 L.Ed.2d 785 (1985).

The district court properly refused to substantively address the appellants' remaining contentions. This court has already rejected the equitable estoppel argument as well as an assertion that the evidence at trial failed to establish that Lot 20 was a wetland at the time of the offenses. In support of the latter ground, the appellants rely on evidence adduced at the subsequently held supervised release hearing. Even if this evidence could support a finding that the property had lost its wetlands character prior to the appellants' ownership, a finding upon which we voice no opinion, the time to present this proof was at the trial on the merits.[6] We find no error in the district court's refusal to revisit the sufficiency of the evidence. *See Hobson*, 825 F.2d at 366. Finally, the record reveals that, even assuming that the selective prosecution ground was not procedurally barred, it is without substance.[7]

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[6] The appellants, who represented themselves at trial, contend they were not competent in the ways of introducing expert opinion testimony on such matters. They do not state, however, that their election to proceed *pro se* was the result of an unknowing or involuntary waiver of their right to counsel.

[7] This allegation is based upon a letter to the United States Attorney, dated February 12, 1987, written by a District Engineer with the Corp recommending that Ocie Mills be criminally prosecuted. (The letter does not mention Carey Mills). The appellants contend they learned of the existence

(continued...)

III. CONCLUSION

In keeping with the foregoing analysis, the district court's judgment denying the appellants' motion for § 2255 relief, or in the alternative, for a writ of error coram nobis, is AFFIRMED.

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[7] (...continued)
of this letter pursuant to a Freedom of Information Act request which they made during their incarceration. Establishing cause for a procedural default ordinarily turns on whether a claim could not have been asserted in a timely manner due to some objective factor external to the defense. *Yeck v. Goodwin*, 985 F.2d 538, 542 (11th Cir.1993). The appellants offer no explanation for their delay in discovering this letter.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA PCR: 88-03100-RV
v. PCR: 91-30428-RV
OCIE MILLS and CAREY C. MILLS.
_____/

ORDER

This cause comes on for consideration upon the magistrate judge's report and recommendation dated June 26, 1992. All parties have been furnished copies of the report and recommendation and have been afforded an opportunity to file objections, pursuant to Title 28, United States Code, Section 636(b)(1). Subject to the following discussion, the report and recommendation is adopted, incorporated into, and made a part of this order.

I. BACKGROUND

This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of Alice in Wonderland, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."

The movants, Ocie Mills and Carey C. Mills, father and son, were found guilty in a 1989 jury trial of five counts of discharging pollutants into the waters of the United States without a permit, in violation of Sections 301(a) and 309(c) the Clean Water Act, Title 33, United States Code, Sections 1311(a) and 1319(c).[1] The two Millses were also found guilty of a misdemeanor offense of unlawfully excavating a canal (the drainage ditch between Lots 19 and 20) in the navigable waters of the United States, in violation of Sections 10 and 12 of the Rivers and Harbors Act, Title 33, United States Code, Sections 403 and 406. Their prosecution and conviction stemmed from their attempt to prepare for building on two waterfront lots (Lots 20 and 21) on Escambia Bay which they purchased in 1986. One lot (Lot

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[1] There have been relatively few criminal prosecutions for violations of the Clean Water Act, and even fewer sentences of incarceration have been imposed. *See, e.g., United States v. Ellen*, 961 F.2d 462 (4th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 217, 121 L. Ed. 2d 155 (1992) (defendant sentenced to six months imprisonment; *United States v. Holland*, 874 F.2d 1470 (11th Cir.1989)) (defendant sentenced to five years probation; probation revoked and six months imprisonment imposed when defendant violated conditions of probation); *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083, 110 S. Ct. 1143, 107 L. Ed. 2d 1047 (1990) (sentence suspended; defendant placed on two years probation); *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020, 62 L. Ed. 2d 756 (1980) (corporate defendant fined; individual defendants fined and sentenced to thirty days in jail); *United States v. Pozsqai*, 757 F.Supp. 21 (E.D.Pa.1991) (defendant fined and sentenced to three years imprisonment).

21) was deemed to be upland, but a significant portion of the other lot (Lot 20) was deemed by the Corps to be a "wetland." Although Lot 20 (like Lot 21) is a waterfront lot, it does not have the appearance of what most lay people think of as a "wetland." Prior to the events in question here, it was originally mostly wooded, with large pine, oak, gum, bay, and magnolia trees, as well as lots of smaller trees and shrubs. Some of these trees grow well in saturated soil conditions, while others do not. A relatively narrow strip of marsh grass along the bay beachline was not directly affected by the Millses' action in question. In its original natural state, the lot had a dish-shaped drain through the center that apparently carried rainwater runoff from inland to the bay, but it had no standing water on it, nor did it appear to be a marsh, swamp, or bog.

After their jury trial, the Millses were each sentenced by Senior Judge Winston E. Arnow of this Court to twenty-one months incarceration, followed by one year of supervised release. In addition, the court imposed a $5000 fine and a special monetary assessment of $250 on each defendant and required the defendants to comply with a Site Restoration Plan. Following their convictions, the Millses filed a direct appeal. The convictions were summarily affirmed by the Eleventh Circuit Court of Appeals. *United States v. Mills*, 904 F.2d 713 (11th Cir.1990) (table).

In a separate subsequent proceeding regarding the Millses' Supervised Release and their obligations under the Site Restoration Plan, I held an extended evidentiary hearing. By order entered herein on December 24, 1991, I determined that the Millses had substantially complied with the Plan, and specifically, that the elevation requirements had all been met. One significant factual development from that proceeding was a determination that, at the time in question, the subject land

(Lot 20) was probably not a "wetland" for purposes of the Clean Water Act. This was because, as a part of the subdivision development in 1978, a drainage that formerly ran through Lot 20 was offset about 45 feet by constructing a ditch between Lots 19 and 20, and the old drain through Lot 20 was blocked and partially filled by the developer. Thus, the diversion of the drain and some filling on Lot 20 was apparently done before the effective date of the applicable Clean Water Act Regulations, and long before the Millses bought their lots in 1986. The Millses, who represented themselves without an attorney at their criminal trial, were not allowed to put on evidence about this, however. Although they challenged this on direct appeal, the Eleventh Circuit affirmed.

The two Millses have now moved to vacate, set aside, or correct their sentences, pursuant to Title 28, United States Code, Section 2255, and/or for a writ of error coram nobis. They have raised four grounds in support of the motion: (1) their convictions for violations of the Clean Water Act are void because Congress has unconstitutionally delegated its legislative authority to the United States Army Corps of Engineers; (2) they were selectively prosecuted; (3) they were denied due process when the trial court prevented them from presenting to the jury the defense of equitable estoppel; (4) there was insufficient evidence to establish that, at the time they placed fill and spoil material on their property, the property was a "wetland."

II. DISCUSSION

Having considered the magistrate judge's report and recommendation and all objections thereto timely filed by the parties, I have determined that the recommendation should be adopted in part. Specifically, I adopt the recommendation of

the magistrate judge that (1) the Millses have procedurally defaulted on the selective prosecution claim, and (2) the defenses of equitable estoppel and sufficiency of the evidence were fully disposed of on direct appeal and, therefore, are not cognizable under Section 2255. As questionable as it now may be, the factual basis of their convictions and the sufficiency of the evidence at their trial were previously affirmed by the Eleventh Circuit, and are not subject to further review by this Court. However, the Millses' contention that the Clean Water Act unconstitutionally delegates power to the United States Army Corps of Engineers (the "Army Corps") merits additional discussion.

As a threshold matter, I note that the Millses failed to raise this constitutional challenge to the Clean Water Act earlier, both in the proceedings before the trial court and on direct appeal.[2] Thus, they procedurally defaulted on the delegation challenge. Generally, the failure to raise a constitutional issue on direct appeal bars a movant from raising the same issue in a Section 2255 proceeding. *Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir.1989), cert. denied, 494 U.S. 1018, 110 S. Ct. 1322, 108 L. Ed. 2d 498 (1990); *Parks v. United States*, 832 F.2d 1244, 1245 (11th Cir.1987). Movants can avoid this procedural bar only by showing cause for the failure to raise the claim on direct

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[2] On direct appeal, the Millses raised vagueness and overbreadth challenges to the constitutionality of 33 U.S.C. § 1311, which prohibits the discharge of pollutants except in compliance with the Clean Water Act. The Mills argued that Section 1311 is "so vague and broad that it encompasses legal conduct which subjects its enforcement to arbitrary and discriminatory enforcement. It is so vague that a person of ordinary intelligence cannot determine what is prohibited." (Doc. 113, Appellant's Br. at 42-43).

appeal and actual prejudice resulting from the failure. *United States v. Frady*, 456 U.S. 152, 167-68, 102 S. Ct. 1584, 1594-95, 71 L. Ed. 2d 816, 830 (1982); *Greene v. United States, supra*, 880 F.2d at 1305.

The Millses make no attempt to show cause for not raising this constitutional challenge earlier. Instead, they argue that to be incarcerated for violating a criminal provision which is void results in a fundamental miscarriage of justice. According to the Millses, such exceptional circumstances excuse their procedural default.

The Millses are correct that, in certain exceptional circumstances, procedural default may be excused in order to avoid a "fundamental miscarriage of justice." *Gonzalez v. Abbott*, 967 F.2d 1499, 1504 (11th Cir.1992). In *Gonzalez v. Abbott, supra*, a challenge to a conviction was raised in a habeas petition which had not been raised at trial or on direct appeal. The petitioner in that case was incarcerated pursuant to a conviction for conspiracy to traffic in cocaine. *Id.*, 967 F.2d at 1500. The petitioner challenged his conviction on the grounds that, prior to the conviction becoming final, the state legislature had repealed the statute creating the substantive offense--trafficking in cocaine--upon which the conspiracy conviction was based. Thus, according to the petitioner, the conspiracy conviction was void.

The district court held that the petitioner had procedurally defaulted on this claim by not raising it earlier, either at trial or on direct appeal. Reversing, the Court of Appeals held that "this claim, if legally founded, establishes that [the] ... conviction ... is void and cannot be a legal cause of imprisonment--notwithstanding any procedural default." *Id.*, 967 F.2d at 1504.

The Millses argue that the same principle excuses their procedural default. According to them, the provisions of the Corps' Regulations which they were convicted of violating are void, because Congress has unconstitutionally delegated its legislative power to the Army Corps of Engineers, an agency of the Executive Branch of government. Thus, the argument goes, a criminal conviction for violating those provisions would itself be void and could not be a legal cause of imprisonment. While I find merit in this argument, I need not decide whether the Millses' procedural default should be excused in order to avoid a fundamental miscarriage of justice. This is because even if I consider the merits of the Millses' delegation challenge, I am constrained by Supreme Court precedent to conclude that the Clean Water Act does not impermissibly delegate legislative power to the Corps of Engineers.

A. Clean Water Act

The Clean Water Act was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Under Sections 301, 404, and 502 of the Clean Water Act [33 U.S.C. §§ 1311, 1344, 1362], it is unlawful to discharge dredged or waste materials into "the navigable waters" without a permit from the Army Corps of Engineers.[3] Most important for

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[3] The prohibition is not stated that succinctly in the Clean Water Act, but is derived from reading the three referenced sections in tandem. Section 301 of the Clean Water Act lays down the general rule of prohibited discharges: "Except in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any

(continued...)

present purposes, violations of the Act carry criminal penalties. The negligent discharge of pollutants, without a permit, into the "navigable waters" is punishable by a fine of between $2500 and $25,000 per day of violation, and imprisonment for not more than one year. 33 U.S.C. § 1319(c)(1). The knowing discharge of pollutants, without a permit, into the "navigable waters" is punishable by a fine of between $5,000 and $50,000, and imprisonment for not more than three years. 33 U.S.C. § 1319(c)(2). As defined in the Act, "sand" is included as a "pollutant."

The key to these sections is the term "navigable waters," for that term determines the very scope of the

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[3] (...continued)
pollutant by any person shall be unlawful." 33 U.S.C. § 1311.

Section 404 of the Act authorizes the Secretary of the Army, acting through the Chief of Engineers, to "issue permits, ... for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a).

Definitions are found in Section 502 of the Act, 33 U.S.C. § 1362. "Discharge of a pollutant" is defined, as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Pollutant" is defined broadly to mean "dredged spoil, solid waste, ... rock, sand, ... discharged into water." 33 U.S.C. § 1362(6). "Navigable waters" is defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

Thus, the Act prohibits the "discharge" of "sand" into the navigable waters--defined as the waters of the United States--without a permit issued by the Corps.

prohibition. Yet, the Act defines "navigable waters" with the utterly non-definitive statement: " 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. s 1362(7).

Therefore, the term "waters of the United States" becomes crucial, for it determines where one can and cannot discharge pollutants--such as sand fill dirt--without a permit. A person who knowingly or willfully discharges such fill dirt, without a permit, into the "waters of the United States" may be imprisoned for up to three years. The term "waters of the United States," however, is defined nowhere in the Act. It is possible that Congress initially assumed that the term would be applied in the traditional manner utilized for such purposes as ascertaining admiralty jurisdiction or the application of the Commerce Clause. But the absence of a definition by Congress left the task of defining "waters of the United States" to the entities charged with administering and enforcing the Act, the Army Corps of Engineers and the Environmental Protection Agency ("EPA").[4]

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[4] The responsibility for administering and enforcing the Clean Water Act is shared by the Corps and the EPA. The EPA has the authority to seek penalties for discharge of pollutants into waters of the United States without a permit. The EPA can issue an order requiring compliance with the Act, bring a civil action for an injunction and penalties, and seek administrative penalties. 33 U.S.C. § 1319.

The Corps has authority to issue permits to discharge dredged or fill materials into waters of the United States. 33 U.S.C. § 1344(a). In issuing such permits, the Corps is to apply guidelines developed by the EPA, in conjunction with the Corps. 33 U.S.C. § 1344(b). The Corps has the

(continued...)

The Army Corps and the EPA enacted identical regulations defining "waters of the United States", and thereby delineated the jurisdictional limits of the Act.[5] The

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[4] (...continued)
authority to enforce violations of these permits, by issuing orders requiring compliance with the permits, and by bringing civil actions for "appropriate relief, including a permanent or temporary injunction" for violation of a compliance order. 33 U.S.C. § 1344(c).

[5] Both the Army Corps of Engineers and the EPA define "waters of the United States" as follows:

The term "waters of the United States" means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(continued...)

regulatory definition includes rivers, lakes, streams, territorial seas, all of which are "waters" in the everyday-sense of the word.

The regulation goes much further, however, and defines "waters of the United States" to include something called "wetlands" which are adjacent to traditional "waters"--rivers, lakes, streams, and territorial seas. The regulation then makes a quantum leap onto land. "Wetlands"

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[5] (...continued)

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. 33 C.F.R. § 328.3(a) (1986) (Army Corps' definition); 40 C.F.R. § 230.3(s) (1980) (EPA definition). Only paragraph (7) has any application here.

are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 328.3(b) (Army Corps definition); 40 C.F.R. § 230.3(t) (EPA definition).

The Millses argue that Congress unconstitutionally delegated its legislative authority to the Army Corps by allowing the Corps to define "waters of the United States" to include "wetlands" in the broad manner it has. According to the Millses, Congress has never defined "waters of the United States" to include wet land, and Congress has never defined "wetlands" in a manner sufficient to meet criminal statute scrutiny. Nor is there an expressed intent of Congress to so delegate that power to the Corps. In short, they point out that there is no statute that makes it a federal crime to place clean, unpolluted sand on dry appearing land, as the Millses were convicted of and for which they each served 21-months federal prison terms. Thus, their argument goes, it is unconstitutional for the Corps to usurp the legislative task of defining "waters of the United States" to include land that may have wetland vegetation growing on it.

B. Delegation

The Constitution provides that "[a]ll legislative Powers herein shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. From this provision is derived the delegation doctrine: Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. ___, ___, 111 S. Ct. 1752, 1759, 114 L. Ed. 2d 219, 227

(1991). This doctrine is "rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371, 109 S. Ct. 647, 654, 102 L. Ed. 2d 714, 730 (1989).

Yet, the principle that the Constitution prohibits Congress from delegating its legislative authority is essentially nugatory, for little is required of Congress when it wants to obtain the assistance of its coordinate branches.[6]

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[6] Only twice in history has the Supreme Court declared unconstitutional a Congressional delegation of authority to a governmental body. *Mistretta v. United States*, 488 U.S. 361, 373, 109 S. Ct. 647, 655, 102 L. Ed. 2d 714, 731 (1989). In 1935 the Supreme Court, in two separate cases, invalidated provisions of the National Industrial Recovery Act of 1933 (the "NIRA"). First, in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935), the Court invalidated the section of the NIRA which authorized the President to issue executive orders to prohibit the transportation of petroleum products in excess of state quotas (so called "hot oil") in interstate commerce, and established criminal penalties for violations of these executive orders.

After examining the NIRA as a whole, the Court concluded that this delegation of authority was unconstitutional. "As to the transportation of [hot oil], the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." 293 U.S. at 430, 55 S. Ct. at 252. Second, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L.

(continued...)

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[6] (...continued)
Ed. 1570 (1935), the Court invalidated the section of the NIRA which authorized the President to establish "codes of fair competition" for trades or industries. According to the Court, Congress had set forth no principles to guide the President in developing codes of fair competition. Such a delegation was unprecedented: [This provision] supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, [the section] sets up no standards, aside from the statement of general aims of rehabilitation, correction, and expansion described in section one.... We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power. 295 U.S. at 541-42, 55 S. Ct. at 848. Since these two cases, however, the Supreme Court has upheld, without deviation, Congress' ability to delegate power to governmental bodies under broad standards. *See, e.g., Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1943) (upholding delegation to FCC to regulate radio broadcasting "as public convenience, interest or necessity requires"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944) (upholding delegation of authority to set "just and reasonable" natural gas rates); *Yakus v. United States*, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944) (upholding delegation to set maximum prices for agricultural commodities which are "generally fair and equitable"); *American Power & Light Co. v. SEC*, 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946) (upholding delegation of authority (continued...)

"So long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Touby v. United States, supra*, ___ U.S. at ___, 111 S. Ct. at 1759, 114 L.Ed.2d at 227 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 352, 72 L. Ed. 624 (1928)); *Mistretta v. United States, supra*, 488 U.S. at 373, 109 S. Ct. at 655, 102 L. Ed. 2d at 730-31.

It is the law of this Circuit that delegation challenges are judged according to the following standard:

> "Congressional legislation which prescribes essential standards an basic legislative policy and delegates to an administrator authority for promulgation of rules and regulations is constitutionally permissible, provided the standards are

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[6] (...continued)
to Securities and Exchange Commission to prevent "unfair or inequitable" distribution of voting power among stockholders); *Lichter v. United States*, 334 U.S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948) (upholding delegation of authority to recover "excessive profits" earned on war contracts). The Court's treatment of the delegation doctrine since the two 1935 cases led one Justice to conclude that "[the] doctrine is surely as moribund as the substantive due process approach of the same [1930s] era." *Nat'l Cable Television v. United States*, 415 U.S. 336, 353, 94 S. Ct. 1146, 1156, 39 L. Ed. 2d 370, 378 (1974) (Marshall, J., concurring in part, dissenting in part).

> sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the [a]dministrator ... has conformed to those standards."

United States v. Sans, 731 F.2d 1521, 1527-28 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111, 105 S. Ct. 791, 83 L. Ed. 2d 785 (1985) (quoting *United States v. Womack*, 654 F.2d 1034, 1037 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 1156, 102 S. Ct. 1029, 71 L. Ed. 2d 314 (1982) (citations omitted)). *See also United States v. Gordon*, 580 F.2d 827 (5th Cir. 1978), *cert. denied*, 439 U.S. 1079, 99 S. Ct. 860, 59 L. Ed. 2d 49 (1979).

In judging the constitutionality of a statutory delegation of authority, a court looks not only to the statute itself, but to the legislative history and the context in which the statute was enacted. "The standards of the statute are not to be tested in isolation but must derive meaningful context from the purpose of the statute and its factual background and the statutory context in which the standards appear." *United States v. Sans, supra*, 731 F.2d at 1528; *United States v. Womack, supra*, 654 F.2d at 1037.

With these considerations in mind, I turn to the issue of whether the Clean Water Act unconstitutionally delegates to the Army Corps of Engineers the authority to define "navigable waters of the United States" in the manner that the Corps has done. The opinion of the Supreme Court of the United States in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), constrains me to conclude that it does not.

Like this case, at issue in *Riverside Bayview Homes* was the authority of the Corps to regulate "wetlands" under

the Clean Water Act. Specifically, the Court considered the question of whether the Act authorized the Corps to require landowners to obtain a permit from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water. *Id.*, 474 U.S. at 123, 106 S. Ct. at 457, 88 L. Ed. 2d at 424. The Court examined the language, policies, and legislative history of the Act, and concluded that the Act did authorize the Corps to regulate wetlands adjacent to navigable bodies of water. "We are thus persuaded that language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.' " *Id.*, 474 U.S. at 139, 106 S. Ct. at 465, 88 L. Ed. 2d at 434.

A review of these same sources--the language, policies, and legislative history--in light of Riverside Bayview Homes, leads me to conclude that the Act did not impermissibly delegate authority to the Army Corps of Engineers by allowing the Corps to define "waters of the United States" as including "wetlands," and to define "wetlands" as encompassing land that is not "wet" in the ordinary sense of the word. First, the legislative history indicates that Congress intended "waters of the United States" to be interpreted to extend as far as was permissible under the Commerce Clause. "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation." *See* H.R. Rep. No. 92-911, 92d Cong., p. 131 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3776, 3822; 118 Cong. Rec. 33692, 33699 (1972) (statement of Senator Muskie); 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell). This has led numerous courts to conclude that Congress intended the "waters of the United States" to reach the full extent

permissible under the Constitution. *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir.1983); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-55 (9th Cir. 1978); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974).

Second, the Supreme Court concluded that the interpretation of the term "waters of the United States" to include wetlands adjacent to what are conventionally thought of as "waters" is consistent with the broad purposes of the Clean Water Act. *Riverside Bayview Homes, supra*, 474 U.S. at 132-33, 106 S. Ct. at 462-63, 88 L. Ed. 2d at 430. The broad purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. In *Riverside Bayview Homes*, the Supreme Court stated that this objective "incorporated a broad, systemic view of the goal of maintaining and improving water quality." 474 U.S. at 132, 106 S. Ct. at 462, 88 L. Ed. 2d at 430.

> [A]s the House Report on the legislation put it, "the word 'integrity' ... refers to a condition in which the natural structure and function of ecosystems is maintained." Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it essential that discharge of pollutants be controlled at the source."

Id., 474 U.S. at 132-33, 106 S. Ct. at 462-63, 88 L. Ed. 2d at 430 (citations omitted).

Thus, the broad purpose of the Act was to protect water quality and aquatic ecosystems. It was this broad purpose which guided the Army Corps when it defined "waters of the United States" to include wetlands adjacent to what are commonly thought of as waters--bays, lakes, rivers, etc. The Corps' definition was judged reasonable in *Riverside Bayview Homes, supra.* The Supreme Court concluded that "in defining the waters covered by the Act to include wetlands, the Corps is 'implementing congressional policy rather than embarking on a frolic of its own.' " *Id.*, 474 U.S. at 139, 106 S. Ct. at 465, 88 L. Ed. 2d at 434.

The Supreme Court's opinion in *Riverside Bayview Homes* has definitively established that the Corps conformed to Congress' "intelligible principle" when it defined "waters of the United States" to include adjacent wetlands. Of course, to a layman, a "wetland" is land that is often, if not mostly, under standing water or so saturated that it is, in fact, wet. That type of wetland is a logical extension of the adjacent body of water. Despite its blanket approval of the Corps' regulatory authority over "wetlands," it is doubtful that the Supreme Court realized that the Corps' definition extends to land that appears to be dry, but which may have some saturated-soil vegetation, as is the situation here, or that it would define the elements of a felony offense.

The Millses contend that more specificity is required when Congress delegates authority to an entity such as the Army Corps of Engineers to pass regulations that contemplate felony criminal sanctions. This issue was expressly left unresolved by the Supreme Court in its most recent delegation case, *Touby v. United States*, 500 U.S. ___, ___, 111 S. Ct. 1752, 1759, 114 L. Ed. 2d 219, 227 (1991). It is certainly true that there is a considerable

difference between the power to administratively regulate and the power to set felony crimes.

As a general principle, the criminal laws are to be strictly construed. This rule of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001, 108 L. Ed. 2d 132, 140 (1990). Statutory language must convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Mena*, 863 F.2d 1522, 1527 (11th Cir.), *cert. denied*, 493 U.S. 834, 110 S. Ct. 109, 107 L. Ed. 2d 72 (1989). This is so that persons of common intelligence will not be forced to guess at the potential applicability of a criminal prohibition to their conduct. *Id.* The statutes enacted by Congress define as criminal the discharge of pollutants into the "waters of the United States." I am unable to say that a person of common intelligence would be able to ascertain that this statutory prohibition applies to clean fill dirt placed onto a waterfront lot such as the one at issue here. Yet the Corps' regulatory power to flesh out the statute to cover wetlands has been specifically approved by the Supreme Court, and it leaves little leeway.

Civil penalties are inherent within a regulatory scheme, but there is a serious question about whether the grant of the power to define certain terms for regulatory purposes rises to the power within the Corps of Engineers to define the elements of a felony offense. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424, 105 S. Ct. 2084, 2087, 85 L. Ed. 2d

434, 439 (1985). Yet a delegation doctrine which essentially allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an un-elected administrative agency such as the Corps of Engineers, does violence to this time-honored principle.

The law of this Circuit appears to be that such delegations of authority are not scrutinized more rigorously. "That the Secretary [of the Treasury] ... could have imposed [reporting requirements] enforceable by criminal penalties did not make the delegation less valid, for 'it is well established that a delegatee may formulate rule for violation of which the statute itself provides penalties imposable by judicial process.' " *United States v. Sans, supra*, 731 F.2d at 1528 (quoting *United States v. Gordon, supra*, 580 F.2d at 840).

III. CONCLUSION

A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency such as the Army Corps--so long as Congress provides an "intelligible principle" to guide that agency--is enough to make any judge pause and question what has happened. Deferent and minimal judicial review of Congress' transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law. Since this court must apply the law as it exists, and cannot change it, there is nothing further that can be done at this level.

For the reasons discussed herein and in the magistrate judge's report and recommendation, the motion to vacate, set aside, or correct sentence, and/or for a writ of error coram nobis, must be, and is, DENIED.

DONE AND ORDERED this __ day of March, 1993.

/s/ ROGER VINSON
ROGER VINSON
United States District Judge

APPENDIX C

33 U.S.C. §§ 1311(a) and 1319(c)

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

§ 1319. Enforcement

(c) Criminal penalties

(1) Negligent violations

Any person who--

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably

should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State; shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such a person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

33 C.F.R. § 328.3

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

THE UNITED STATES CONSTITUTION

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.